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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1156.

MAYTE C. ROSS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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INTRODUCTION.

The respondent bases his opposition to the granting of the petition for certiorari in this case upon three propositions:

(1) That the record does not show that petitioner purchased any real estate, and the only sales of real estate by

petitioner were of a residence and property secured by mortgage certificates. (Br. p. 4-5.)

(2) That the phrase "management of real estate" means the renting of property and the caring for it as a landlord. (Br. 5.)

(3) That since the petitioner, under respondent's theory of the case, is not engaged in the managing of real estate there is no conflict with *Pinchot* v. *Commissioner*, 113 F. (2d) 718 (C. C. A. 2), or *Helvering* v. *Highland*, 124 F. (2d) 556 (C. C. A. 4). (Br. 7.)

The petitioner replies to these points as raised by the respondent as follows:

I.

We think that the record discloses that during the years here involved the petitioner did buy and sell for profit large tracts of real estate for a substantial consideration in each instance (R. 14, 15, 16 and 17). The tracts of land which the petitioner secured control of, purchased and sold, were as follows:

(a) Properties located on the west side of 178th Street, New York City (R. 14 and 15).

(b) 270 Convent Avenue, New York City (R. 16).

(c) Ten parcels of land located in Eastern New Jersey (R. 16).

In each of the above listed purchases and sales it became necessary for the petitioner to secure control of the property, foreclose the mortgages thereon, obtain title to the property and sell the same (R. 15 and 16).

With regard to the properties located on the west side of 178th Street, New York City, the petitioner's witness Ross testified as follows (R. 15):

"* * * We got control of the entire issue; we then proceeded to foreclose the mortgage. The mortgage

was foreclosed, title taken to the property, in the name of Mayte C. Ross. After title was taken to the property I then proceeded to secure a purchaser for the property which I finally succeeded in doing and the property was sold for $76,000. * * *"

With respect to the property located at 270 Convent Avenue, New York City, the witness Ross testified (R. 16):

"* * * After considerable pressure we did get control of the property. That was one large property located at 270 Convent Avenue, New York City. After we withdrew the property from a rehabilitator we next proceeded to find a buyer. We had two or three purchasers in mind. After weeks of negotiations, when Mr. Smith, one of the trustees, decided to cooperate and accept a bona fide, legitimate offer made and the property was finally liquidated. I think the correct amount was $155,000. * * *"

As to the ten parcels of land located in the eastern part of New Jersey, the witness Ross testified (R. 16):

"* * * This certificate covered about ten parcels altogether, located mainly in the eastern part of New Jersey. At first I communicated with Mr. Mosher, a very prominent real estate man in New Jersey and had a conference with him as to the best way to proceed to liquidate these properties. We discussed these various issues and decided upon a course of action. There were other certificates on a number of properties—I think two or three of them. We had full control. We had control of the $4,400 certificate. That was the Fred Eckes located at South Sumner Street, Bergen, New Jersey. We also had control of the Charles Kuhlmann, located at 215 45th Street, North Bergen, New Jersey. We also had control of $7,000, Messina, located at 10 Backman Place, Irvington, New Jersey. We liquidated about two-thirds of these properties. By that I mean we succeeded in turning them into cash either through sale of the property or sale of the certificate. We still have the other third which is slowly being paid off. * * *"

In order to carry out these transactions it was necessary to maintain an office at 1441 Broadway, New York City. The testimony of the witness Ross with respect to the office and the carrying on of the negotiations was as follows (R. 17):

> "During the period I have been testifying to, 1935, 1936 and 1937 I did maintain an office because I had been very active with all these situations which required meetings, it required conferences, it required hearing people, engaging experts, required the services of attorneys. I had my office at 1441 Broadway, New York. * * *"

It is respectfully submitted that the testimony of the witness Ross clearly shows that the petitioner did, during the years here involved, secure control of, buy and sell real estate; that an office was maintained for this purpose and that there was a holding out to others that petitioner was securing control of, buying and selling real property. These facts as developed by the record squarely present the question which we think should be settled by this Honorable Court, as set forth at page 7 of the petition for certiorari, as follows:

(1) Does the buying and selling of real property constitute the "carrying on of a business" within the meaning of Section 23(a) of the Revenue Acts?

(2) What extent of activity in the buying and selling and management of real property is necessary to meet the test of "carrying on any trade or business" under said Section 23(a)?

It is respectfully urged that these questions are properly before the Court for decision under Mr. Justice Frankfurter's definition of the term "trade or business" in *Deputy v. du Pont*, 308 U. S. 488, as follows:

> "What the activities of a taxpayer are is an issue for determination by triers of fact. Whether such activities constitute a 'trade or business' as conceived by

§ 23(a), is open for determination here *unfettered by findings and rulings below* except for the weight of the intrinsic authority of all lower court opinions. To avail of the deductions allowed by § 23(a), it is not enough to incur expenses in the active concern over one's own financial interest. '* * * carrying on any trade or business', within the contemplation of § 23(a) involves holding one's self out to others as engaged in the selling of goods or services." (Italics supplied.)

II.

It appears that the respondent's theory is that the management of real estate should be interpreted as consisting of renting property and caring for it as a landlord (Br. 6) rather than the buying and selling thereof for profit. In its published bulletin the Treasury Department has determined that the owner of realty rented for residential purposes is entitled to depreciation deductions even though the operation of such property is not the principal trade or business of the taxpayer (Bulletin F, revised as of January, 1932 and published by the Treasury Department in connection with rates of depreciation, page 85).

Please see also *John D. Fackler* v. *Commissioner*, 45 B. T. A. 708 in which a similar determination by the Treasury Department was upheld by the United States Board of Tax Appeals.

We think that the respondent's interpretation of the term "management of real estate or real estate business" is too narrow and that if a person who merely owns a building and collects rent therefrom is to be regarded as engaged in the "real estate business" then certainly one who buys and sells real estate for profit must also be held to be engaged in the real estate business. The instant case is illustrative of the point. Here Mrs. Ross maintained an office and bought and sold real estate and secured control thereof on a substantial scale, employing realtors, accountants and lawyers in connection with her transactions. Is she to be denied the deduction of her expenses in connection with these transactions on the theory that she is not engaged in business whereas one

who merely rents a building is regarded as being engaged in business and entitled to deduct expenses and depreciation?

III.

We think that the decision of the Courts in *Helvering* v. *Cecil B. Highland, Executor*, 124 F. (2d) 556 (C. C. A. 4) and *Pinchot* v. *Commissioner*, 113 F. (2d) 718 (C. C. A. 2) sustain the position of the petitioner in this case and that, as pointed out in the petition for certiorari, there is a conflict between the decisions of the Courts in the foregoing cases and the decision of the Circuit Court of Appeals for the Third Circuit in the case at bar.

In *Pinchot* v. *Commissioner*, *supra*, the Court held that the management of one's own real estate constituted the "carrying on of a business". We believe that the record in the instant case sustains the petitioner's position that she managed her real estate holdings in New York and New Jersey and also that during the years in question the petitioner actually secured control of the properties in New York and New Jersey, obtained title to them and sold them at a profit. We think that these transactions constituted a carrying on of a real estate business under the decision of the Courts of Appeal in *Pinchot* v. *Commissioner*, *supra*, and *Highland* v. *Commissioner*, *supra*. The petitioner did not merely keep records with respect to her securities and collect dividends and interest thereon as in *Higgins* v. *Commissioner*, 312 U. S. 212. She vigorously carried on the buying and selling of real property for a profit. Furthermore the petitioner was active in her transactions, not a mere passive investor. As pointed out in respondent's brief (page 5), she ousted the president of a business corporation (R. 18 and 20), thus increasing her income and in addition carried on the extensive transactions discussed hereinabove as well as the mortgage transactions in Florida referred to at pages 5 and 6 of the petition for certiorari. We think it immaterial that at the outset of her transactions she possessed merely mortgage certificates. The record shows that she secured

control of and purchased the properties underlying these certificates and then actually sold these real properties for profit.

CONCLUSION.

For the reasons set forth in the petition for certiorari and as above set forth, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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